Supreme Court, U.S.
FILED
DEC 15 1993
OFFICE OF THE CLERK

No. 93-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

PATRICK L. SWINDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

PETITONER'S SUPPLEMENTAL BRIEF PRESENTING LATE AUTHORITY

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PETITIONER'S SUPPLEMENTAL BRIEF PRESENTING LATE AUTHORITY

On December 3, 1993, after the Respondent's Brief in Opposition in this case was filed, the United States District Court for the District of Nebraska entered a decision in the case of *United States v. Durenberger,* Cr. No. 3-93-65, slip op. at 1 (D. Neb. Dec. 3, 1993) (App. at A-1). In Durenberger, the district court addressed the same issue presented in this case and concluded that when the government violates a member of Congress' privilege under the Speech or Debate Clause of the United States Constitution and the violation occurs before a grand jury, the indictment is invalid and must be dismissed. Slip op. at 6 (App. at A-7). Significantly, in *Durenberger*, there was no claim that the government relied upon Speech or Debate material to secure the indictment against Durenberger. Slip op. at 4 (App. at A-5).

The district court's decision in *Durenberger* underscores the severity of the conflict that exists between the circuits with respect to the test to be applied when a grand jury proceeding is infected by a Speech or Debate violation. It also underscores the injustice that would result should this Court fail to resolve this conflict, thereby allowing Petitioner to be afforded less protection by the Speech or Debate clause than other members of Congress have been afforded by the exact same clause, simply because Petitioner was subject to the jurisdiction of a different court.

In *Durenberger*, defendant David Durenberger appeared before the Senate Ethics Committee as a United States Senator while under investigation for alleged misconduct. After Durenberger appeared

before the Senate Ethics Committee, the government presented select pages from the Report of the Select Committee on Ethics and the Report of the Special Counsel on Senate Resolution 311 to a grand jury that was also investigating Durenberger. Afterwards, the grand jury indicted Durenberger for substantive crimes that Durenberger had allegedly committed while serving in the United States Senate. Slip op. at 2 (App. at A-3).

ARGUMENT

I. THE DISTRICT COURT'S DECISION IN DURENBERGER DEMONSTRATES THE INEQUITABLE RESULTS IN THE VARIOUS CIRCUITS WITH RESPECT TO THE EFFECT OF SPEECH OR DEBATE VIOLATIONS THAT OCCUR DURING GRAND JURY PROCEEDINGS.

The district court's decision in *Durenberger* is significant because it graphically demonstrates the inequitable results that have occurred in the various circuits when the privilege afforded members of Congress by the Speech or Debate Clause is violated during grand jury proceedings. Specifically, in *Durenberger*, the district court concluded that, when a violation occurs during a grand jury proceeding in the Eighth Circuit, the principles established by this court in *United States v. Johnson*, 383 U.S. 169 (1966), *United States v. Gravel*, 408 U.S. 606 (1972), and *United States v. Helstoski*, 442 U.S. 477 (1979), *mandate* that the indictment be dismissed without prejudice, even though the government did not rely on the offensive material in bringing its indictment. Slip op. at 4 (App. at A-5).

In dismissing the indictment against Durenberger, the district

court reached the same result that the Third Circuit reached in *United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980) (*Helstoski II*), when it determined that, when a violation of the Speech or Debate clause occurs during a grand jury proceeding, the indictment is invalid and must be dismissed *as to each and every count, even if some of the counts did not depend on Speech or Debate material for their proof.* The results in the Eighth and Third Circuits are quite different from the result reached by the Eleventh Circuit in this case.

In the instant case, the Eleventh Circuit dismissed only three of the nine counts in Petitioner's indictment because, in the view of the court of appeals, "Swindall's Speech or Debate claims affect[ed] only Counts One, Nine and Ten. Only with respect to these counts did the government use evidence of Swindall's committee memberships" to prove its case. *United States v. Swindall*, 971 F.2d 1531, 1542 (11th Cir. 1992) (Pet. App. I at A-20). Consequently, because Petitioner was indicted in the Eleventh Circuit, rather than in the Eighth or Third Circuits, he was not afforded the same degree of constitutional protection that former United States Representative Helstoski and United States Senator Durenberger were afforded in similar situations *but different circuits*.

II. THE DISTRICT COURT'S DECISION IN DURENBERGER DEMONSTRATES THE CONFUSION THAT THE ELEVENTH CIRCUIT'S DECISION IN THIS CASE HAS CAUSED WITH RESPECT TO THE REMEDY THAT IS TO BE APPLIED WHEN A SPEECH OR DEBATE VIOLATION OCCURS DURING A GRAND JURY PROCEEDING.

The district court's decision in *Durenberger* is also

significant because it vividly demonstrates the confusion that has resulted from the disparity that exists between the Eleventh Circuit's express recognition of the principles established by this Court in *Johnson*, *Gravel*, and *Helstoski* and its subtle, but nonetheless substantial, failure to actually apply those principles to all of the counts of Petitioner's indictment.[1] In fact, as can be seen in the following excerpt from the district court's decision in *Durenberger*, the Eleventh Circuit's failure to apply the principles set forth in *Johnson*, *Gravel*, and *Helstoski* is so subtle that the district court actually overlooked the distinction that the Eleventh Circuit made between the counts that relied upon Speech or Debate material for their proof and those that did not. The result of the district court's oversight was that it *erroneously* cited the instant case as authority for the principle that a violation of the Speech or Debate Clause during a grand jury proceeding mandates dismissal of an indictment *even though the government did not rely on the offensive material to secure the indictment*:

> I agree with the decision[s] rendered by the Third and Eleventh Circuit[s] that when a violation of the Speech or Debate Clause occurs during the grand jury proceedings, the privilege must be vindicated prior to trial. *Helstoski*

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[1]After correctly determining that Respondent violated Petitioner's Speech or Debate privilege during the grand jury proceedings in this case, the Eleventh Circuit concluded that the proper remedy was to dismiss *only those counts* that were dependent on Speech or Debate material for their proof. *See* Swindall, 971 F.2d at 1542 (Pet. App. I at A-20). *See* Swindall, 971 F.2d at 1538-1545 (Pet. App. I at A-11 through A-24).

[II], 635 F.2d at 1546-47. As the Third Circuit stated:

> It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause came into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring the privilege in a presentation to a grand jury. Invocation of the constitutional privilege at a later stage cannot undo the damage. If it is to serve its purpose, the shield must be raised at the beginning.

Helstoski [II], 635 F.2d at 205 (emphasis added).

> When presenting evidence to the grand jury, a prosecutor must uphold the Constitution and refrain from submitting evidence of past legislative acts or the motivation for performing such acts. *Id.* at 206. Therefore, the indictment against Senator Durenberger cannot stand.
>
> The dismissal shall be without prejudice, because reliance upon the offensive evidence does not appear to be necessary.

Durenberger, slip op. at 5-6 (App. at A-6, 7).

When the district court in *Durenberger* cited the instant case as supporting authority for its decision to dismiss the indictment without prejudice *because reliance upon the offensive evidence did not appear to be necessary*, it apparently did not notice that, in this case, the Eleventh Circuit did not dismiss without prejudice those counts in petitioner's indictment that (to the Eleventh Circuit's thinking) did not rely on the offensive Speech or Debate evidence that Respondent introduced during Petitioner's grand jury proceedings. Instead, the Eleventh Circuit affirmed Petitioner's convictions with respect to

each count that it determined (erroneously)[2] not to be dependent upon Speech or Debate material for its proof.

Should the government appeal the district court's decision in Durenberger to the Eighth Circuit Court of Appeals, the government will almost certainly argue that the district court's reliance on the Eleventh Circuit's decision in this case is misplaced because, in fact, the Eleventh Circuit's decision conflicts with the Third Circuit's decision in *Helstoski II* with respect to the necessity of dismissing the entirety of an indictment when a Speech or Debate violation occurs during a grand jury proceeding. The government's argument in this regard will be valid because the Eleventh Circuit's decision in this case very clearly conflicts with the Third Circuit's decision in *Helstoski II* with respect to the remedy to be applied when a member of Congress' Speech or Debate privilege is violated during a grand jury proceeding.

CONCLUSION

The Eleventh Circuit's failure to apply the principles established by this Court in *Johnson*, *Gravel*, and *Helstoski* has already created confusion among the circuits regarding the effect that Speech or Debate violations, during grand jury proceedings, have with respect to counts that are not dependent on Speech or Debate material for their proof. Unless

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[2]In fact, Respondent did rely on Speech or Debate material to prove that each count of Petitioner's indictment was material to the grand jury's investigation of possible violations of the "structuring transaction" provisions of Title 31. *See* Pet. Reply at 6 n.2.

this Court grants the Petition in this case, the confusion will continue. Moreover, if this Court does not grant this Petition, a grave injustice will result because Petitioner will have been afforded a significantly lesser level of constitutional protection than has been afforded to other members of Congress similarly situated. Accordingly, the Petition should be granted.

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APPENDIX: UNITED STATES V. DURENBERGER, CR. NO. 3-93-65, slip op. (D. Neb. Dec. 3, 1993)

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Criminal No. 3-93-65

MEMORANDUM AND ORDER ON DEFENDANT DURENBERGER'S MOTION TO DISMISS

DAVID P. DURENBERGER,
MICHAEL C. MAHONEY,
PAUL P. OVERGAARD,

Defendants.

Following an in *camera* review of the testimony and exhibits from the federal grand jury proceedings against David Durenberger, I isolated two documents from an exhibit and granted the defendant an opportunity to review the documents and issue a response. The government was also granted the opportunity to reply to the defendant's response. Having carefully reviewed the submitted responses, I shall now consider the defendant's motion to dismiss, which is founded on two grounds. Durenberger first argues that his indictment should be dismissed because the government violated the Speech Debate Clause ("Clause") when it submitted to the grand jury selected pages from the Report of the Select Committee on Ethics and the Report of Special Counsel on Senate Resolution 311 ("Reports") pertaining to his alleged misconduct. Second, Duren-

berger contends the indictment against him should be dismissed because government counsel have committed prosecutorial misconduct in this case. I shall consider each ground separately.

I. SPEECH OR DEBATE CLAUSE

A. The Reports

In preparation for the resolution of this motion to dismiss, the parties extensively briefed the purposes and boundaries of the Clause. In addition, Magistrate Judge Cudd issued a well-reasoned Report and Recommendation, filing 127, in which he detailed both the historic and present-day judicial incorporations of the Clause. Therefore, I find it unnecessary to augment the impressive scholarship already submitted on the subject.

Rather, I find it necessary to resolve two issues: Did the submission of select pages from the Reports on Senator David Durenberger to the grand jury violated the Speech or Debate Clause? If so, does the constitutional violation mandate the dismissal of the indictment against him?

The Clause broadly protects members of Congress "against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," *United States v. Erewater*, 403 U.S. 901, 525 (1972), and "precludes any showing of how [a member of Congress], acted, voted, or decided." *Id.* at 527. The Supreme Court has declared that "past legislative acts of a Member cannot be admitted without undermining the values protected by the Clause." *United States v. Helstoski*, 442 U.S. 447, 489 (1979). By submitting evidence of legislative acts the government may reveal to a grand jury "information about the performance of legislative acts and the legislator's motivation in con-

ducting official duties." *Id.* Disclosing information on legislative acts subjects a member of Congress to being "questioned" in a place other than the House or Senate, thereby violating the explicit prohibition of the Speech or Debate Clause." *Id.*

Relying on *Federal Election Comm'r v. Wright*, 777 F. Supp. 325, 530 (N.D. Tex, 1991), the government argues that committee reports, if privileged, are only privileged as to the members who participate in the report's preparation, not to the member whose conduct is at issue before the committee. I find the notion of extending the evidentiary privilege to a member of congress serving on a senate or house committee but not to a member of congress appearing before a committee illogical, and I decline to follow *Wright*.

The United States Supreme Court has declared that the Speech or Debate clause should be construed "broadly to effectuate its purpose." *United States v. Johnson*, 383 U.S. 169, 180 (1965). As I construe the clause, the privilege extends to a senator, representative, or high-ranking legislative aide engaged in a legislative act. The acts of investigating, conducting hearings, providing testimony, preparing reports, are all "integral part(s) of the deliberative and communicative process by which Members participate in committee...proceedings...with respect to...matters which the Constitution places within the jurisdiction of either House." *See Does v. McMillan*, 412 U.S. 306, 313 (1973) (quoting *United States v. Gravel*, 403 U.S. 606, 625 (1972)). As such, the official acts performed by senators sitting on the Senate Select Committee on Ethics, as well as acts by senators and their high-ranking aides appearing before the Committee, are protected by

the Clause. *Cf. McMillan*, 412 U.S. at 313.

The record establishes that David Durenberger appeared before the Senate Ethics Committee as a United States senator under investigation for alleged misconduct. Douglas Kelly appeared before the Committee as a former high-ranking aide to Durenberger. As such, I find both the representations of Durenberger and Kelly in the Reports as well as the Reports themselves to be within the sphere of protected legislative activity and, therefore, privileged. *Hutchinson v. Proxmire*, 443 U.S. 111, 124-25 (1979); *United States v. Swindall*, 971 F. 2d 1531, 1543 n. 12 (11th Cir. 1992); and *Miller v. Transamerican Press, Inc.*, 709 F. 2d 524, 529 (9th Cir. 1983).

The government advances the argument that submission of the Reports to the grand jury was harmless because the government never read from or referred to the Reports, and the grand jury never considered the Reports. Moreover, the government argues that submission of the Reports was harmless because the grand jury was given a precautionary instruction not to consider any findings and conclusions from other investigations.

Considering that the government submitted hundreds of pages of exhibit materials, it is conceivable that the grand jury never found, let alone read, the selected pages from the Reports. On the other hand, the government has conceded that the select pages from the Reports were marked and admitted into evidence as part of exhibit 23 to the December 2, 1992, testimony. The pages from the Reports accompanied the testimony of an important and prominent witness. it seems equally plausible that the grand jury members attached great significance to the factual findings of the Select

Committee on Ethics and Special Counsel and relied on the Reports to justify, in whole or in part its indictment against Durenberger. Because no one--including government council--knows what weight, if any, the grand jury attached to the selected pages from t he Reports, I cannot find that the constitutional error was harmless.

Nor does the claim that the government allegedly issued a precautionary instruction to the grand jury cure the constitutional violation. As the colloquy between government counsel and the grand jury was not transcribed, no record of a precautionary instruction is before me for review. Accordingly, I cannot find that the instruction was constitutionally sufficient.

Rather, I must find that the government, by including select pages from the Reports in the exhibit materials, impermissibly exposed the grand jury to privileged evidence and violated the defendant's rights under the clause.

B. The Indictment

The more difficult issue before me is whether my finding mandates dismissal of the indictment. In its brief opposing the motion to dismiss the government cites the case of *United States v. Brewster*, 408 U.S. 001 (1979) in support of its claim that the indictment is facially valid and should not be dismissed. I have studied the case and find that it does not control the disposition of the instant case. *Brewster* did not involve an explicit constitutional challenge that the government had improperly submitted to the grand jury evidence of a legislative act in violation of the clause. The defendant in *Brewster* did not contend, as in this case, that the government had introduced tainted evidence in

violation of the clause which mandated that the indictment be invalidated.

In its brief in support of dismissal the defendant claims that two appellate cases should persuade me to dismiss the indictment. *United States v. Swindall*, 971 F.2d 1501 (11th Cir. 1992) and *United States v. Helstoski Helstoski II*), 635 F. 2d 200 (3rd Cir. 1980). The legal issues in these cases are closely analogous; however, the underlying facts are distinguishable from the instant case. In *Swindall* the Eleventh Circuit dismissed the indictment because the Government had conceded that "evidence of Swindall's legislative acts was an essential element of proof with respect to the affected counts." *Id.* at 1549. There is no claim in this case that the government relied on the select pages of the Reports to secure the indictment against Durenberger. In *Helstoski*, the Third Circuit dismissed an indictment because the improper admission of privileged evidence "permeated the whole [grand jury] proceeding," *Id.* 635 F.2d at 205. Despite the defendant's contention to the contrary, I am not persuaded that this case involves of a pervasive, widespread violation of the Clause. Rather [this] case involves the submission to the grand jury of eleven pages taken from privileged Reports, which were included as part of a larger exhibit not prepared by the government nor ever referred to by the government.

After examining the facts of the case I have determined that *United States v. Gravel*, 408 U.S. 606 (1972) controls the disposition of the defendant's motion to dismiss. In *Gravel* the Supreme court declared that "the Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom

of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Id.* et 616. The Clause, the Court declared, "protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Id.*

Both *Swindall* and *Helstoski* emphasize that the Clause is intended to protect a member of Congress engaged in legislative acts from criminal or civil liability. *Swindall* 971 F.2d at 1544; *Helstoski*, 635 F.2d at 202. Protection from criminal liability includes protection not only from conviction but from prosecution. *Id. See United States v. Helstoski (Helstoski I)* 442 U.S. 477, 488 (1979). Indeed, the Supreme Court has declared that "the central role of the Speech or Debate Clause [is] to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *United States v. Johnson*, 383 U.S. 169, 181 (1966).

Under the United States Constitution the Senate has a duty to discipline its members. U.S. Const. art. 1., § 5, cl, 2. The Senate has delegated this important legislative duty to the Select Committee on Ethics. The defendant contends and I agree that if a member of the Senate believes that his statements to the committee or the findings of the Committee and its Special Counsel could be introduced as evidence against him one day in a grand jury proceeding, then the intimidation caused by the prospect or criminal liability will chill senators and severely undermine the ability of the Committee to effectively investigate and discipline members. In order for the Committee to procure full cooperation in its investigations and proceedings, committee members, senators under investigation, and their high-ranking legislative aides must have the

assurance of knowing that their testimony is privileged as are the factual findings and conclusions of any reports issued by the Committee.

Unlike other constitutional challenges to indictments which the Supreme Court has rejected, the purpose served by the Clause is fundamentally different. In marked contrast to other constitutional guarantees, the Supreme Court has declared that "[t]he Speech or Debate Clause was designed neither to assure fair trials nor to avoid coercion. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979) (emphasis added). Accordingly, I find that in order to protect the integrity and independence of the Committee, I must dismiss the indictment against David Durenberger.

I have considered and rejected the option of staying the motion to dismiss until after trial. *Res United States v. Mechanik*, 475 U.S. 66, 76 (1986) (O'Connor, J., concurring). I agree with the decision rendered by the Third and Eleventh Circuit that a violation of the Speech or Debate Clause privilege occurs prior to trial. *Helstoski*, 638 F.2d at 204; *Swindall* 971 F.2d at 1546-47. As the Third Circuit stated:

> It cannot be doubted, therefore, that the mere threat of an indictment is enough to intimidate the average congressman and jeopardize his independence. Yet, it was to prevent just such overreaching that the speech or debate clause comes into being. A hostile executive department may effectively neutralize a troublesome legislator, despite the absence of admissible evidence to convict, simply by ignoring or threatening to ignore the privilege in a presentation to a grand jury. Investigation of the constitutional protection at a later stage cannot undo the

> damage. If it is to serve its purpose, the shield must be raised at the beginning.

Helstoski, 638 F.2d at 205 (emphasis added).

When presenting evidence to the grand jury, a prosecutor must uphold the Constitution and refrain from submitting evidence of past legislative acts or the motivation for performing such acts. *Id.* at 206. In this case government counsel did not uphold the Constitution. Therefore, the indictment against Senator Durenberger cannot stand.

The dismissal shall be without prejudice, because reliance upon the offensive evidence does not appear to be necessary.

II. PROSECUTORIAL MISCONDUCT

On an alternative theory the defendant moves the court to dismiss the indictment and disqualify the responsible government counsel on the basis or prosecutorial misconduct. Specifically, the defendant claims that (1) the government emphatically denied that the grand jury had been exposed to select portions of the Reports; (2) the government attempted to dissuade this court from conducting a full *in camera* review of the grand jury testimony and exhibits; and (3) the government sent an *ex parte* letter to the court informing the court that the grand jury had access to select pages from the Reports.

In *United States v. Morrison*, 449 U.S. 361, 365 (1981), the Supreme Court declared that "absent demonstrable prejudice , or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate."

In this case the defendant has made no showing of either actual

prejudice or a substantial threat of prejudice. It is true that had I not ordered a full *in camera* inspection of the grand jury proceedings, the selected pages from the Reports would not have been discovered and the defendant's constitutional right to prepare an adequate defense would have been impaired. However, I find no prospective threat of prejudice in allowing government counsel to proceed to trial.

After reviewing the arguments in favor of and in opposition to dismissal and disqualification, I am not persuaded that sufficiently serious misconduct has occurred in this case to warrant either dismissal or disqualification based on prosecutorial misconduct. Dismissal and disqualification founded upon prosecutorial misconduct are drastic remedial measures which I should hesitate to impose except when absolutely necessary. *See Matter of Grand Jury Subpoena of Roehon*, 872 F.2d 170, 176 (7th Cir. 1949) (quoted by Eighth Circuit in *United States v. Rosnov*, 977 F.2d 209, 411 (8th Cir. 1992)).

That I decline to impose these measures at this stage does not signify that I am not concerned with government counsels' conduct. Whether their conduct represents a case of overzealous prosecution by attorneys having little or no regard for prosecutorial ethics or a case of repeated inadvertence bordering on recklessness need not be resolved in the absence of a showing of prejudice or threat of future prejudice. I do remind counsel Sterch and Hulser that as government prosecutors and as officers of the court they are charged with the duties of due diligence and candor. Henceforth, government counsel shall make no misrepresentation to opposing counsel or to this court, lest I reconsider the request for disqual-

ification.

IF IS THEREFORE ORDERED that:

(1) the defendant Durenberger's motions to dismiss the indictment, filings 37 and 144, are granted and the indictment is dismissed without prejudice as the defendant Durenberger on the ground that the government violated the Speech or Debate Clause but are denied on the ground of prosecutorial misconduct; and

(2) defendant Mahoney's joinder with Durenberger's motion to dismiss for alleged prosecutorial misconduct, filing 147, is denied.

Dated December 3, 1993.

BY THE COURT

/s/ Warren K. Urbom
United States Senior District Judge